United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2158 B
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To Be Argued By
Barbara Ann Shore

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JOEL SMITH, a/k/a CHARLES SMITH,

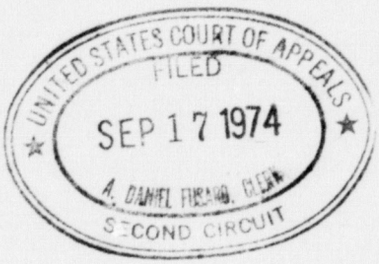
Petitioner-Appellee,

-against-

ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility,

Respondent-Appellant.

BRIEF AND APPENDIX



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BRIEF FOR RESPONDENT-APPELLANT

Questions Presented

1. In a habeas corpus proceeding, was it proper for the District Court to conduct a de novo review of the trial evidence, before petitioner had properly exhausted his state remedies.

2. In conducting such a review, did the District Court correctly conclude that the jury charge was insufficient according to New York law?

3. In conducting such a review, assuming arguendo that the jury charge was insufficient according to New York law, did the District Court correctly conclude that the error reached constitutional proportions?

4. In conducting such a review, did the District Court correctly conclude that the introduction of a co-defendant's statement was not harmless error?

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Dooling, J). dated August 15, 1974, which granted petitioner's application for a writ of habeas corpus.

Facts

Petitioner, Joel Smith was convicted of the crime of manslaughter in the first degree following a joint jury trial with co-defendant Leroy Sprinkler, in the former New York County Court, Kings County (Marasco, J.) on September 24, 1959. On October 28, 1959, he was sentenced to a term of 10 to 20 years imprisonment.

The Trial

Petitioner was indicted with Leroy Sprinkler, Fred Sprinkler and Allen LaFrank, under # 1191-59, for manslaughter in the first degree and assault in the second degree. Subsequently, Fred Sprinkler and Allen LaFrank pleaded guilty, and only petitioner and Leroy Sprinkler were tried by a jury.

The trial began on September 21, 1959. The prosecutor frist called Ethel Cross, sister of the deceased to testify as to the identity of the deceased (T. 13-14)* The body was discovered in the Albany Housing Project Play Area around 10:15 on April 8, 1959, by a Patrolman Alloco (17). The patrolman observed a man lying on the bench, face up with blood in the area of his abdomen and chest (18-19). The deceased's pockets appeared ripped out or cut out. Dr. Ruger, Deputy Chief Medical Examiner of New York City testified that he found 14 stab wounds on the chest and body, nine of which could have caused death (70-72). He could not discover which stab wounds were inflicted first.

* Numbers in parenthesis refer to the Trial Minutes.

The prosecutor called four witnesses who had been in the play area that night. They were Daniel Pacilli, Fred Sprinkler, Allen LaFrank and Arthur Burrows.

Daniel Pacilli testified that on April 8, 1959, at about 10:00 P.M., he had been in the Albany Housing Project Play area, along with Arthur Burrows, petitioner, Leroy Sprinkler, Fred Sprinkler and Allen LaFrank (55). The youths had been drinking. Then Fred Sprinkler told Jesse Cross to go home and put on a coat. The two youths argued; Fred slapped Jesse and was pushed away by his brother Leroy. Leroy slapped Jess and told him to behave himself. Then, according to the witness, Joel Smith said, "I am going to stab him" and then "he ran over towards Jesse Cross with a knife, and Leroy Sprinkler stopped him, and he took the knife from Joel and gave it to Allen LaFrank and then Allen LaFrank gave it to Freddie, and that is when Freddie went over to Jesse Cross." (57).

At this point, petitioner was ten feet away from Cross (64). Pacilli testifed that People's Exhibit "4" was the knife in Joel Smith's hand that night (58). He

later observed Fred Sprinkler stab Jesse Cross (59). He testified that later, after leaving the park, petitioner said "something like" Freddie should not have done it (59).

Fred Sprinkler had been a co-defendant but pleaded guilty on June 4, 1959 to manslaughter, first degree with the understanding that he would be allowed to plead to manslaughter second degree if he testified truthfully (79). He corroborated Daniel Pacilli's recitation and further testified that during the argument, Jesse Cross hit the witness with a cast on his right arm (80) and the witness smacked the deceased. At this point, petitioner pulled out the knife. Fred Sprinkler stopped the petitioner (81). When Fred Sprinkler got the knife, marked as People's Exhibit "4" for identfication, he stabbed Cross four times in the abdomen (81). Cross was moaning (107). He then threw the knife down and left with his brother, leaving petitioner, LaFrank and Pacilli in the park (82). He saw petitioner later and in the presence of Tommay Abrams, heard petitioner say that "[Fred] stabbed him four times, and that he was still alive when I left, and he [Joel Smith] stabbed him twice himself."

Fred Sprinkler stated that he had told the Assistant District Attorney that he stabbbed Jesse Cross four times and that the petitioner had admitted the stabbing to him (109).

Allen LaFrank testified concerning the drinking and the argument. He testified that he took the knife from the petitioner who was holding it, blade up (125) He identified the knife, People's Exhibit "4" as his knife. He testified that he gave the knife to petitioner previously that evening (125) when he had been in a fight. He had been indicted with petitioner, but had pleaded guilty with the promise that it would be reduced to assault in the second degree if he testified truthfully (128).

Arthur Burrows testified essentially the same as Pacilli, Sprinkler and LaFrank. He stated that Joel Smith had pulled out the knife and said, "Stab the boy" and ran towards Jesse, and Leroy grabbed him and took the knife from him and pushed him back. . ." (166-167). Leroy Sprinkler gave the knife to LaFrank who gave it to Fred Sprinkler who stabbed the deceased (170). He only saw Sprinkler stab the deceased around the stomach (172) and not the chest, but saw him rip the pockets (172).

Tommy Abrams testified that on April 8, 1959, some time after a quarter after ten that night, he heard Joel Smith tell Fred Sprinkler "that they messed up a guy. . ." and [Joel Smith] went back and stabbed him again (36). Abrams testified that he did not tell the Assistant District Attorney about the conversation until the day before he testified (47). He admitted to a prior criminal record (37).

Neither petitioner nor Leroy Sprinkler testified. However, a redacted statement by Leroy Sprinkler was read into evidence, the Court charging that the statement was binding only on Leroy Sprinkler (149, 158). That statement concerned Leroy hitting Jesse Cross, and was redacted to read that Joel Smith met the Sprinklers and Thomas Abrams, omitting what he said.

Leroy Sprinkler's conversations (163) to Detectives Luisi and Burnes were introduced with the Court's admonishment that the statements were not binding on petitioner (180, 194). Detective Luisi testified that Leroy Sprinkler had stated he saw his brother strike the deceased, and he pushed his brother aside. Sprinkler also said that he took the knife from the petitioner. Detective Burnes testified that in a second conversation, Leroy Sprinkler had said "there was an argument,

Fred Sprinkler stabbed Jesse Cross, and that Joel Smith had told Abrams and the Sprinklers that he did him over a couple of times (196). This conversation was admitted as binding on Leroy Sprinkler (196).

Detective Reiter testified that petitioner had led him to an electrical catch basin on Dean Street and told him where the knife was, identified as People's Exhibit "4" (177).

The People rested and petitioner's and Sprinkler's attorney moved to dismiss the indictments. These motions were denied.

The Court charged the jury, and a verdict was returned finding petitioner and Leroy Sprinkler guilty of the crime of manslaughter in the first degree. On October 28, 1959, petitioner was sentenced to a term of 10 to 20 years imprisonment. He filed no notice of appeal.

Petitioner's Appeal

Petitioner filed several proceedings for relief in the nature of coram nobis after his time for appeal had elapsed. In one petition, he claimed he was indigent and was not told

by his private attorney that he could appeal at the expense of the State. That petition was denied by the New York County Court, Kings County and that decision was upheld by the Appellate Division, Second Department, 19 A D 2d 728 (1968) and the New York Court of Appeals, People v. Smith, 14 N Y 2d 696 (1964).

Petitioner made the same claim in a petition for a writ of habeas corpus, denied by the Eastern District Court, but granted by this Court. United States ex rel. Smith v. McMann, 417 F. 2d 648 (1969). This Court found that Smith was entitled to be informed of his right to appeal without expense by counsel appointed by the State. This Court ordered that petitioner must be given a hearing to determine that the information was given.

On January 16, 1972, a hearing was held; the October 1959 sentence was vacated and petitioner was resentenced nunc pro tunc to the original sentence. Supreme Court, Kings County, Appeal No. 9216 (Damiani, J.). Petitioner then appealed his conviction. On November 20, 1972, the Appellate Division, Second Department affirmed his conviction. Leave to appeal was denied by Judge Burke of the New York Court of Appeals.

Prior Federal Action

Petitioner has brought five other actions in the Eastern District of New York, all of which have been dismissed (Docket Nos. 73 C. 1544, 72 C. 769, 72 C. 1426, 68 C. 183, 71 C. 1585).

By petition dated February 13, 1974, petitioner sought the instant writ of habeas corpus in the United States District Court for the Eastern District of New York alleging numerous defects in his judgment of conviction. He claimed that (1) his guilt was not established beyond a reasonable doubt, (2) he was not an accomplice to the crime, (3) the trial judge charged that the defendants ". . .may or may not refuse to testify on their own behalf. . ." omitting the word neglect, (4) the Court permitted the prosecution to solicit from witnesses that they had pleaded guilty to the same crime that petitioner was indicted for, (5) petitioner was not informed of his constitutional rights upon arrest, (6) the People's evidence failed to meet the requirements of the Code of Criminal Procedure, § 399, which requires non-accomplice confrontation in the crimes, (7) the trial court refused petitioner's request to inspect a statement by Fred Sprinkler, an accomplice, made to an Assistant District

Attorney, (8) the sentence was harsh and excessive, and (9) the co-defendants' judgment of conviction was reversed. Respondent-appellant filed answering papers on June 20, 1973.

Opinion Below

Judge Dooling wrote a memorandum order on April 9, 1974. He outlined the evidentiary case and stated: "The evidence more than sufficed to support a verdict of petitioner's guilt beyond a reasonable doubt - save for the allegation of an act done in the heat of passion - that is, that Smith and others, acting in concert and each aiding and abetting the other, without a design to effect death, in the heat of passion struck Jesse J. Cross, with a dangerous weapon, to wit, a dangerous knife and with their hands, fists and booted feet, thereby inflicted diverse wounds upon Jesse J. Cross and Cross died of the wounds, said act not being justifiable or excusable" (Opinion, p. 10).

Judge Dooling went on to say that the jury charge was meager and inadequate (12). He stated that the jury was not instructed about what crime they could find, if satisfied

that petitioner had not participated in the first affray but "had inflicted two later wounds and were not convinced that the wounds he inflicted were among the fatal wounds" (12).

Judge Dooling stated that there was no discussion of intoxication or its possible effect on intention. Furthermore, he stated the Court failed to submit a charge of second degree manslaughter, which could have been submitted under former Code of Criminal Procedure 444.

Judge Dooling held that the trial judge failed to discuss heat of passion. "What is lost in the approach of the charge is that it gave the jury no opportunity to decide that the killing was a gusty misadventure resulting from a senseless inception of words in the middle of a drinking bout rather than 'a killing in the heat of passion.'" (16-17). Judge Dooling also stated that the charge of aiding and abetting gave the idea of calculation to the scene (17).

The court below also stated that omission of the word "neglect" was an unhappy error.

Judge Dooling also noted that petitioner's counsel did not take relevant exception to the charge.

Judge Dooling also raised at this date the question of the use of Leroy Sprinkler's statement. He held that the question of harmless error was not evident. He concluded:

> "Two matters remain for full consideration in the State court, that is, first, review of the charge in the respects noted above with a view to determining whether it resulted in denying petitioner fundamental due process through failure to effect a fair submission of the case to the jury as against petitioner, and second, the Bruton-Chapman-Harrington matter." He ordered the case retained on the docket of the Court, pending further State review.

Petitioner moved to reargue the earlier appeal and the motion was denied on July 2, 1974, the Appellate Division, Second Department, saying:

> "With due respect to any view which the United States District Court may have, this court has considered all the issues on this motion and the predicate appeal. We adhere to our position after reconsideration and trust that the Federal Court will likewise respect the autonomous jurisdiction of the court over the subject matter of the appeal."

Decision-order of August 15, 1974

The court below held "since the record does not show that the Court has considered the constitutional questions presented and adjudicated them in accordance with the applied principles of constitutional law, the federal court is not free to deny relief."

I. Petitioner failed to exhaust his state remedies

In his decision-order of April 9, 1974, Judge Dooling stated that two matters remained for full consideration in the state court: (1) whether the charge to the jury denied petitioner fundamental due process and (2) whether the admission into evidence of petitioner's co-defendant's statements was harmless error. Thus, it would appear that petitioner had failed to exhaust his state remedies, as of April 9, 1974.

Petitioner then filed a motion to reargue his appeal in the New York State Appellate Division, Second Department. Petitioner used as a basis for this motion the grounds suggested by Judge Dooling. The Appellate Division, Second Department denied the motion to reargue the appeal.

Assuming arguendo, that petitioner filed his action properly, there is no evidence that he has filed for leave to appeal to the New York Court of Appeals. Thus, he has still failed to exhaust his state remedies.

However, it is respectfully submitted that petitioner has failed to present his claims properly in the state courts, and the decision below should be reversed on this ground alone.

Section 440.10(h) of the New York Criminal Procedure Law specifically provides a basis for the relief sought in this case, that is: "The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Such relief must be sought in the court in which the judgment was made, not in the Appellate Division.

The answering affidavit of the Assistant District Attorney to petitioner's motion to reargue suggests that § 440.10(h) was the proper method for presenting the issues suggested by Judge Dooling.

If, as the court below suggests "the record does not disclose that the court (the Appellate Division) has considered the constitutional questions presented and adjudicated them in accordance with the applicable principles of constitutional law,", it is because the Appellate Division lacked jurisdiction to consider these issues.

The United States Supreme Court has made it clear that in order to exhaust state remedies:

> "the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent

> 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution (citation omitted), it is not sufficient merely that the federal habeas applicant has been through the state courts . . .The substance of a federal habeas corpus claim must first be presented to the state courts.'" Picard v. Connor, 404 U.S. 270, 275 (1971).

To be fairly presented, means more than raising an issue on motion to reargue. In a habeas corpus case similar to the one at bar, the petitioner had brought an appeal on due process grounds in the state court. Upon a motion by petitioner, the Appellate Division amended its earlier decision to add that it had considered petitioner's Fourteenth Amendment rights. This court, although dismissing petitioner's application on the merits, stated, "it is plainly true that a statement by a court that it has considered a defendant's Fourteenth Amendment rights does not reveal with certainty that the equal protection clause was actually weighed. Still, a possible implication of the use of such broad language is that defendant's claim was considered. . .in light of all relevant portions of the Fourteenth Amendment. . .we seriously question though whether this case satisfies the exhaustion requirements as interpreted in Picard v. Connor." United States ex rel. Curtis v. Warden of Green Haven, 463 F. 2d 84, 86 (2d Cir. 1974).

Where there is a proper state forum to present the constitutional issue, the petitioner must exhaust his state remedies. Ralls v. Manson (2d Cir. 1974), Slip. Op. 4697 (July 5, 1974); United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir. 1972). The court below has erred in acting as a court of first instance.

II. The court below erred in concluding that the trial court's charge to the jury violated New York Law

In analyzing the trial court's charge to the jury, the court below listed infirmities which he felt made the charge inadequate. However, the jury charge was adequate according to New York law.

Judge Dooling noted that there was no dicussion of intoxication and its effect on intent. However, petitioner was indicted for manslaughter, which specifically leaves out intent. There was evidence that the youths had been drinking. Under these circumstances, intoxication does not excuse a man from first degree manslaughter although it lessens the intent. § 1220 of former New York Penal Law. People v. Lee, 300 N.Y. 422 (1950). Here, there was no charge of intent and the omission of specific instructions concerning intoxication was proper.

Secondly, Judge Dooling questions the confusion between "heat of passion" and "a brawl", as in the case at bar. However, New York cases support "first degree manslaughter" convictions even when the parties had been drinking and fighting over a long period of time. People v. Lee, 300 N.Y. 422 (1950). Heat of passion does not mean violent rage, but "state of mind in which there is an absence of design to cause death and an absence of a deliberate implementation of such a design. . .[It is] a sudden urge and in the sense of spontaneous action." People v. Lewis, 282 A D 2d 267, 269 (3rd Dept. 1953).

There was no need to charge a lesser offense when the evidence fitted the charge, as Judge Dooling concedes* save for the word "heat of passion." Furthermore, appellee's counsel did not request the charge. Thus, even if it was error, such error does not mandate reversal. People v. Jones, 32 A D 2d 1069 (2d Dept. 1969).

* He, however, questioned whether there was evidence of "heat of passion", as is discussed in the preceding paragraph.

Judge Dooling held that the instruction concerning the defendant's silence was "unhappy." However, the cases cited in his opinion are not directly in point. In People v. Fitzgerald, 156 N.Y. 253, the trial court confused the issue by contrasting the defendant's silence with his taking the stand. Furthermore, there was entirely circumstantial evidence in that case. In People v. McLucas, 15 N Y 2d 167, the trial court, noted that an out-of-court statement did not take the place of sworn testimony, again spotlighting the defendant's silence. In this case, the judge's omission of one word cannot be termed prejudicial, particularly as he went on to say that defendant's "failure to do so raises no presumption against them", conforming to the language in § 60.15, subdivision 2 of the new Penal Law. People v. Sullinger, 265 A.D. 235 (1942).

Judge Dooling names other possible confusing issues in the trial court's charge. However, most importantly, appellee's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of these points (§ 420-a of the former Code of Criminal Procedure). Cf. Fed. Rules Crim. Proc., R. 51; United States v. Jacobs, 413 F. 2d 1105 (D.C. 1969); United States v. Dibrizzi, 393 F. 2d 642 (2d Cir. 1968).

In the absence of such objections, the State's highest court is loathe to reverse the trial court. There are instances of reversals in the interests of justice (People v. Anderson, 37 A D 2d 729 (holding "alibi" charge erroneously shifted presumption of innocence). However, there was no indication that the interest of justice would be served by reversal. There was a full and fair hearing of the issues involved. Thus, assuming there were trial errors:

> "By oversight or mistake, slips may occur in the progress of a long trial which may be fully and fairly connected or may be of no consequence. This court has no disposition to exaggerate such inadvertences into undue importance. Where defendant has on the whole had fair trial. with no substantial error which might tend to influence the verdict appearing on the record, the Code requires (Code Crim. Proc. § 542) and the court recognizes (People v. Sprague, 217 N.Y. 373, 379) that the judgment of conviction should be affirmed." People v. Dixon, 231 N.Y. 111, 120; People v. Jones, 32 A D 2d 1069 (1969).

The test is clear; whether the jury after hearing the charge would gather the correct rules for reaching its decision. People v. Johnson, 185 N.Y. 219, 232; People v. Russell, 266 N.Y. 147; People v. Goldstein, 285 N.Y. 376, 383. In this case there was ample basis for the jury verdict and the State courts held that the conviction should be affirmed.

III. Assuming arguendo that the jury charge was reversible as a matter of State law, nonetheless the court below erred in holding that the jury charge was constitutional error.

From his opinion, it is clear that Judge Dooling based his analysis of the jury trial on State law. However, the State courts had already held that the jury charge was not reversible error.

It is established principle in this circuit that a jury charge is normally a matter of State law. "A writ is not available to review alleged prejudicial statements in the court's charge. . .absent a showing that they deprived defendant of a fundamentally fair trial." United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969), Cf. United States ex rel. Mintzer v. Dros, 403 F. 2d 42 (2d Cir. 1967); United States ex rel. Peterson v. LaVallee, 279 F. 2d 396, 400 (1960); Corby v. Conboy, 337 F. Supp. 517 (S.D.N.Y. 1971). This court is bound by State interpretation of State law. O'Brien v. Skinner, _____U.S._____, 94 S. Ct. 740, 744 (1974).

In this case, there was a full and fair hearing. Viewed in totality, the judge's charge did not deprive the petitioner of a fair trial. As the Supreme Court has stated in holding a State trial court's erroneous "presumption of truthfulness charge (where the defendant was silent)" did not reach constitutional dimensions:

> "Before a federal court may overturn a conviction resulting from a state trial in which the instruction was used, it must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment. . . not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which only result in the judgment of conviction."

Furthermore, to reverse the trial court would upset the principles of state federal comity. In Schaefer v. Leone, 443 F. 2d 482 (2d Cir. 1971), there was a claim that the jury charge left out instructions concerning intent. The state courts affirmed the conviction. This Court stated:

> "[The trial court's] action has been affirmed by the highest court of the commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the

> State law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law if one occurred, as a denial of due process, otherwise every erroneous decision by a state court on state law would come here as a federal constitutional question." Schaefer v. Leone, 443 F. 2d 182, 195 (1971).

Review by federal court of State Court convictions "is limited to the enforcement of 'those fundamental principles of liberty and justice'. . .which are secured by the Fourteenth Amendment." McNabb v. United States, 318 U.S. 322, 340 (1943).

IV. Assuming arguendo that the introduction of the co-defendant's statement was error, nonetheless it was harmless error in light of the Chapman and Harrington decisions

Three conversations by petitioner's co-defendant were introduced into evidence. Each time, the trial court instructed the jury that the statement applied only to the co-defendant.

However, it held that introduction of a co-defendant's out-of-court statement, who remained silent during trial, deprived a defendant of his right to confrontation. This was held to be retroactive in Roberts v. Russell, 392 U.S. 243 (1968).

However, not all constitutional errors are so prejudicial that the conviction must be reversed. They may be "in the setting of a particular case. . .so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967); Harrington v. California, 395 U.S. 250, 251 (1968); Milton v. Wainwright, 407 U.S. 371, 377-378 (1972). In Harrington v. California, the defendant was tried with three others, one of whom took the stand and could be cross-examined. Although, out-of-court statements were introduced, the court held that there was overwhelming evidence of guilt on "our own reading of the record and on what seems to us to have been the probable impact. . .on the minds of an average jury." Supra at 254. Thus, any constitutional error was harmless. Schneble v. Florida, 405 U.S. 4267 (1972) upheld the conviction of a person where his admission and his co-defendant's were admitted into evidence and neither testified.

The Court held:

> "The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases, the

> properly admitted evidence of guilt is so overwhelming and the prejudicial effect of co-defendant's admission is so insignificant by comparison that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Supra at 430. There was no evidence that the jury would have found the People's case less persuasive if the co-defendant's admissions had been excluded.

This circuit has held that violations of the Bruton rule were harmless error where there is additional evidence against the defendants. United States ex rel. Dukes v. Wallack, 414 F. 2d 246 (2d Cir. 1969); United States ex rel. Duff v. Zelker, 452 F. 2d (2d Cir. 1971).

See also Brown v. United States, 411 U.S. 223, 230-232 (1973).

In this case, using the criteria of Harrington and Schneble, it is clear that the jury did not require Leroy Sprinkler's statement to reach its verdict. There was testimony concerning petitioner taking out his knife and running toward Jesse Cross by four witnesses, all available for cross-examination. Two witnesses, who could be cross-examined,

testified that petitioner admitted stabbing Jesse Cross. The knife was admitted into evidence without objection by counsel. Leroy Sprinkler's evidence added nothing to the testimony. The evidence was overwhelmingly against the petitioner and the Bruton error, if any, was harmless error.

CONCLUSION

THE DECISION OF THE COURT BELOW SHOULD BE REVERSED AND THE APPLICATION DENIED.

Dated: New York, New York
September 17, 1974

Respectfully submitted,

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APPENDIX A

THE TRIAL COURT'S CHARGE TO THE JURY

day in your experiences in life, socially, in business, and otherwise. After meeting with people socially, after having business meetings with people, you instinctively, you intuitively reach certain conclusions about their character or make-up. You got that. That is all derived from your meeting with people and associating with them. You will apply that same knowledge, apply those tests, those standards that you apply there, here. How do the witnesses here impress you? Were they truthful? Were they frank? Did they vacillate; did they equivocate? Do you find that any witness had an interest in the outcome of this trial to such an extent that the witness might have colored his testimony? Do you find that any witness deliberately testified falsely regarding any material fact in the case? If you do, you may disregard such witness' entire testimony or you may accept so much of it as you believe to be true and disregard the rest of it.

During the trial, objections were interposed by both sides to this litigation, and it is a litigation gentlemen. On the one hand we have the People of the State of New York, the plaintiffs, against the defendants, and it is a litigation. We call it a prosecution by indictment.

As I said, objections were interposed. I either sustained the objections or I overruled them. I did so advisedly, not because of favoritism to one side as against the other, but I ruled as I did because in my judgment, the questions asked by either side either complied with or they failed to comply with the established rules of evidence; and, gentlemen, we have rules in the conduct of criminal trials the same as you have in any other function. Therefore, you are not to concern yourselves with the reasons that impelled me or motivated me in ruling as I did. I was dealing there with questions of law. You have no concern with the law in this case anymore than I have with the factual side of this case.

Therefore, don't consider the reasons that impelled me to do it, and you will consider only such evidence as the Court permitted to get into the record. In other words, where a question was asked and an objection was interposed, and I sustained the objection, there was no answer given. The mere asking of a question is not evidence. Forget, in other words, that the question was ever asked, and consider the evidence here only on the basis of such evidence that the Court permitted to get into the record.

At the end of the People's case, and again at the end of the whole case, you remember all the lawyers came up to the bench here. They addressed themselves to the Court regarding certain legal phases, certain legal implications attendant upon the law involved here. I have made my ruling, and in effect it is this. I am submitting to you for your final determination the issue of the guilt or the non-guilt of these defendants according to law as it will be expounded to you in a few moments.

You heard reference made to an indictment. What is an indictment? It is an accusation in writing. It is informative. It tells the defendant what he is charged with, the scope, the reason, why he is indicted, the crime he is charged with having committed. This is not proof of the defendantds guilt. It has not what we call in law any probative value. It is not proof; it is just an outline informing the defendants of the nature of the charges against them. In other words, it is the vehicle or the instrument by which or through which defendants come into court there to meet their accusers; in other words, to go to trial. Therefore, there is no justification in a finding of guilt simply based on the charge here. This is only a charge, and you are to give it no further effect

other than what I have instructed you.

As they sit there, the defendants are cloaked with; they are clothed with a certain amount of protection that the law visits upon them. They are presumed to be innocent. They start out with the inference that they are presumed to be innocent, and that presumption runs with them throughout the entire trial until you by your verdict should say otherwise. In other words, the law says you are presumed to be innocent. What does it all mean in simple language? It means this; whereas in other countries a defendant must prove his innocence, here a defendant can remain mute, silent, inarticulate, as these defendants have chosen to do. They don't have to prove anything. The prosecution bears the responsibility of proving their guilt beyond a reasonable doubt, and I will come to that in just a moment.

The legal phraseology, the expression "beyond a reasonable doubt," means what? It is simply this; "reasonable" is something which indicates that the conclusion or the opinion which you hold is something for which you gave yourself a reason; in other words, something founded on reason. We, as rational, sane people, act as we do because reason suggests to us as sane people that our act is a proper act, a sane act.

Therefore, we act according to the suggestion of reason; in other words, we have a reason for doing what we do, and that is all it means here, even though we have the surplusage of language--beyond a reasonable doubt. It means simply what I just told you, a doubt you can give yourself a reason for having, if you have one.

As applied here, a reasonable doubt may be defined as such a doubt you have if, after weighing all the testimony carefully, viewing it from every angle, considering it thoroughly and conscientiously, you then have a doubt regarding the defendant's guilt for which you can give yourself a reason, and that doubt must come from where--from the evidence in the case or the absence or lack of evidence. Such a doubt, a doubt you can give yourselves a reason for having, a reasonable doubt, must be resolved in favor of the defendants.

Of course, a reasonable doubt must not be a subterfuge, a pretext or an excuse to avoid doing what you may consider to be an unpleasant task. That is not a reasonable doubt, and neither is a reasonable doubt predicated upon sympathy for the defendants or prejudice against the prosecution, but if as honest, conscientious jurors, mindful of the sanctity and the

solemnity of the oath that was administered to you--you remember, you raised your hands heavenward and you swore before the Almighty that you were going to decide this case on the basis of evidence and the law. Obviously, if you allow yourselves to be influenced by considerations of sympathy or prejudice, or any extraneous consideration, you are violating the oath that you took and you are recreant to your duties as jurors. Therefore, hold yourselves to a strict accountability on the basis of the oath that you took, to wit, to decide this case only and solely on the law and on the evidence as it was unfolded in this trial.

Going further, the term"reasonable doubt" does not mean beyond all peradventure of a doubt; it does not mean beyond every possible doubt or beyond a grave doubt or a slight doubt; it means just what I said a moment ago; you hold the District Attorney to that degree of proof that the law holds him to, no more and no less, and again I repeat--to prove the defendants guilty beyond a reasonable doubt.

You cannot expect the prosecutor in any criminal case, Gentlemen, to come into a court room armed with a motion picture camera and say, "Gentlemen, I now show you pictures which prove that it is impossible

for the defendants to be innocent." Such degree of proof is rarely attainable in the administration of criminal justice. Hold him, therefore, to what the law holds him--to prove the defendants guilty beyond a reasonable doubt.

The question of the punishment that may be visited upon the defendants, should you find them guilty, is no concern of yours. You are not to talk about it. Give it no thought. Clearly, your function here is to decide whether they are guilty or not guilty according to law. Give it no thought. Clearly, your function here is to decide whether they are guilty or not guilty according to law. The punishment rests with the Court. Therefore, do not concern yourselves with; do not talk about, don't give any thought whatsoever to what may happen to these defendants if you find them guilty. It is none of your concern, anymore than it is my concern to decide what the facts in this case are.

You have heard the legal effect of the indictment, and I shall now read the indictment to you. In other words, I shall read now the charges against the defendants. These defendants, and two others, who are not on trial, who have since pleaded guilty, were charged by the Grand Jury with the crime of manslaughter

in the first degree, which they claim was committed as follows; "The defendants, acting in concert, and each aiding and abetting the other, on or about April 8th, 1959, in the County of Kings, without a design to effect death, in the heat of passion, struck Jesse J. Cross, also known as Jessie J. Cross, with
36) a dangerous weapon, to wit, a dangerous knife, and
36) with their hands, fists, and booted feet, and thereby inflicted divers wounds upon Jesse J. Cross, also known as Jessie J. Cross, thereafter, and on or about April 8th, 1959, said Jesse J. Cross also known as Jessie J. Cross, died of said wounds, said act not being justifiable or excusable." The next charge is one of assault in the second degree which they claim was committed by the defendants acting in concert, and each aiding and abetting the other, on or about April 8th, 1959, in the County of Kings, assaulted Jesse J. Cross, also known as Jessie J. Cross, by wilfully and wrongfully wounding and inflicting grievous bodily harm upon him with their hands, booted feet, and knife.

Gentlemen, the two charges I have read are separate and distinct crimes. I shall later on, in my charge, differentiate for you and tell you what your considerations will be and what your con-

clusions may be. For the time being, we are not concerned with that.

Let us now define and discuss the charge of manslaughter. Manslaughter in the first degree, and that is what we are concerned with now, is defined as follows:

"Such homicide is manslaughter in the first degree when committed without a design to effect death, in the heat of passion, by means of a dangerous weapon."

I have read only that portion of the law as is applicable to the charge here, because the charge here is that the crime was committed by means of a dangerous weapon.

Therefore, manslaughter in the first degree is committed when without a design to effect death, in the heat of passion, by means of a dangerous weapon, a homicide ensues.

Before you take up and consider that, I call your attention to Section 1041 of the Penal Law which reads as follows:

"No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant as alleged are each established as independent facts,

the former by direct proof, and the latter beyond a reasonable doubt. That is what we call in law the corpus delicti; that is, the body of the crime, not the body of the person, but the body of the crime. We call it in law the corpus delicti.

Gentlemen, following that reason, that someone is dead is directly proved whenever a dead body is found. Its identity as that of the person alleged to have been killed is the further fact next to be established in the process of investigation, and the identity must be established beyond a reasonable doubt.

From the testimony of Dr. Ruger, who performed the autopsy, and who testified that he saw the dead man in the morgue on the date mentioned by him and that the dead man was identified to him by Mrs. Cross and by Patrolman Allocco, there is direct proof here, if you believe it, of the death of Jesse J. Cross.

As to the killing by the defendants, as charged, proof as to that may be either circumstantial or direct, but it must be proved by the People beyond a reasonable doubt. Before these defendants may be convicted of manslaughter, there must be proof, direct proof, that the person who is alleged to have been killed is dead, and either direct or circumstantial

evidence that the person who is dead is the person alleged to have been killed. The fact of the killing by the defendants must be shown by direct or circumstantial evidence or by both, and beyond a reasonable doubt.

The prosecution need not prove that there was no design to effect death. If you come to the conclusion, gentlemen, that the prosecution has established the guilt of the defendants, and the essential elements of the crime of manslaughter in the first degree beyond a reasonable doubt; that is, that the death was caused by the use of a dangerous weapon, and by a dangerous weapon in this case is meant a knife, then it will be your duty to convict them of the crime of manslaughter in the first degree.

If you come to the conclusion that the guilt of the defendants has not been proved to your satisfaction beyond a reasonable doubt as to one or both, then you will find such person as to whom you entertain a reasonable doubt not guilty and convict such person regarding whose guilt you are satisfied beyond a reasonable doubt.

You will note the charges that the defendants, acting in concert, aided and abetted each other. Let us read Section 2 of the Penal Law, which reads

as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, under the law is a principal."

By the provisions of the law just read to you, the person committing the act which constitutes a violation of the Penal Law, and anyone associated with him, inducing, helping or encouraging the perpetration of the criminal act, are all guilty as principals; in other words, the law makes no distinction in point of view of culpability or guilt between the person or persons who are actually present and take part in the commission of the criminal act and their accomplices. The one who does less is as guilty as the one who does more. If all are engaged in a common purpose or design, and while so mutually engaged, anything done or said by any of them, intended to effectuate the common purpose or design, is binding upon and attributable to all who are parties to the common enterprise. After the attainment of their objective, however; that is, after the commission of the crime charged, the mutuality or design or the mutual understanding concerning the commission of the crime, terminates, and anything

thereafter said or done by any of them binds only the one who says or does the thing.

You will recall I charged you previously on the effect to be given to the alleged admission by the defendant. I charged you and I again charge you, the statement made to the District Attorney which they claim to have been a confession, having been made after the commission of the crime, then and there, the binding effect is only on the one who made the statement to the exclusion of the other defendant.

The theory of the case here is, gentlemen, that the defendants, and the others who also were indicted, but who are not any longer on trial, regarding whose guilt I charge you now, even though they are not on trial, they were still active participants in the crime, and as to their testimony, you will consider it with caution, particularly since there is evidence that they do expect some consideration from the Court in exchange for the giving of the testimony. In each instance the plea is to be reduced to a lower plea. You will, therefore, scrutinize their testimony very carefully. As to their testimony, the law goes further. An accomplice's testimony is not sufficient. It must be corroborated by other

evidence which tends to connect the defendant with the commission of the crime. You will now consider apropos of that, and on that score, the testimony of the witnesses in this case.

Briefly, and I am not going to review the testimony here, it was done very comprehensively by counsel for both sides; the contention of the prosecution, gentlemen, is, briefly, that on April 8th, 1959, in this county, at a playground in a public park, where these defendants and a person named Jesse Cross, who is no longer with us, he having died as the result of an assault committed on him, but they were there all drinking wine when an argument ensued, as a result of which, the acts which you are considering now occurred.

In support of its contention, the prosecution called a number of witnesses whose testimony you have heard, and I will tell you now, you are not to consider such testimony as I may touch upon as being more important than the other testimony in the case; not at all. Your bounden duty is to consider all the evidence in the case, both for and against. All the testimony is to be considered by you, but briefly, in order to assist you, and to bring out what I have referred to as the contention of the

prosecution, you have the testimony of the witness named Abrams who said that as the result of a conversation he had with Smith, Smith is alleged to have said to him, "We just messed up a guy." The prosecution submits that to you in the nature of a confession or admission of guilt.

The witness La Frank testified that Smith in his presence took out a knife, and La Frank also testified that Leroy Sprinkler pushed across and he also testified that he saw Leroy Sprinkler kick Cross. Burroughs testified that Fred Sprinkler stabbed the deceased in the region of the stomach, and he also testified that Leroy gave the knife to him, and he also saw Leroy smack Cross. I am using the language as it was given here.

Detective Burnes testified that Leroy Sprinkler told him that he hit Cross. Detective Reiter said that Smith told him where the knife had been thrown, and that as a result of such information, he Reiter, and the defendant Smith went there where the knife was recovered.

Fred Sprinkler testified that Smith told him that he had stabbed Cross twice. He also testified that the defendant Leroy Sprinkler, his brother, simply pushed him away.

These are the circumstances upon which the prosecution submits this case to you. You are going to determine on the basis of the testimony in this case, gentlemen, whether or not the theory as I have outlined it for you; that is to say, the charge that the defendants, acting in concert, aiding and abetting one another in the heat of passion, without a design to effect the death of the deceased, and I repeat, what is meant by that? There is no claim or contention here that the defendants intended to kill. If such were present, the charge here would be either murder in the first degree or murder in the second degree.

37) Therefore, there is no claim that they intended to do what they are charged with doing. The law says that if you do anything in the heat of passion, but without a design, without an intent to kill, then you may be guilty of manslaughter in either the first or second degree, and the charge here is manslaughter in the first degree because they claim the killing resulted from the use of a dangerous weapon; that is to say, the knife. That is, briefly, the contention of the prosecution, and that gives you the comprehensive or complete status or picture of the whole case.

The defendants did not testify in this case. I charge you now that a person or persons accused of crime may or may not refuse to testify in their own behalf, and their failure to do so raises no presumption against them; in other words, the mere fact that the defendants did not testify, raises no unfavorable impression against them.

The defendants have not taken the stand and you will consider then the case on the basis of the testimony you have heard.

Before I go further, gentlemen, let us reason this thing out so that you may apply the rules that I have suggested for your guidance and the law. I repeat, in order to convict the defendants, you must be satisfied beyond a reasonable doubt as to the manslaughter, that they and each of them and the other people who were associated with them, according to the charge, acted in such a way that they aided and abetted each other, so that the act committed and which resulted in the death of the deceased can be charged or is chargeable to them. I have given you the law on the effect to be given to a person who is concerned in the commission of a crime and who aids and abets in the commission. If you find that the defendants aided and abetted, if they did

anything to indicate that they were mutually concerned in the commission of this act, the one who did little is just as guilty as the one who did much.

Of course, the mere presence of the defendants there, without saying or doing something, which you might construe to be done or said to effectuate their common objective; in other words, if they were there at that time and they did or said anything which was intended to carry out their objective, then I charge you as a matter of law that you may find that the defendants are guilty under the theory that being accomplices, the act of one binds the other, but I repeat, in order to convict them, you must find beyond a reasonable doubt that they did aid and abet, that they were concerned in the commission of the crime, that they did something to carry out their mutuality of design or the effect to be given to their act must be such which proves to you beyond a reasonable doubt that they were engaged in, that they were pursuing a line of activity which was intended to bring about the act which resulted in the death of the deceased.

If you are satisfied that they did, whether they did much, whether they did little, were they there--being there alone is not sufficient--but did they

say anything, did they do anything which led or helped to carry out this crime; then I charge you that you may find them guilty of manslaughter in the first degree.

We have the other charge, assault in the second degree. The defendants are charged with wilfully and wrongfully assaulting the deceased Jesse Cross by the use of a dangerous weapon which is likely to produce grievous bodily harm. The prosecution must establish beyond a reasonable doubt as to this charge of assault that the defendants assaulted Jesse Cross with the specific intent to do him bodily harm, and that they used for that purpose the knife in question. It must also be shown that the knife in question was an instrument or thing which by its very nature or character was likely to cause grievous bodily harm.

We speak of intent. Intent, gentlemen, is the secret and silent operation of the mind whereby a person seeks to attain a certain objective, and like every other mental process or function, intent is not visible to the naked eye. We can't open up a man's skull and look into his cranium to see what he is thinking about, but we may judge his acts either by verbal declarations, by what he says, or you have heard

the saying, "Sometimes actions speak louder than words." So that the remedy of ascertaining one's intent is not limited merely to the exercise of your vocal cords. You may give out with expressions of what your intent is by the way you are conducting yourself. In other words, actions speak louder than words, and the law says that every person is presumed to intend the natural consequences of his act.

Here you have the testimony of Dr. Ruger, and I am digressing for a moment in order to differentiate between the two charges. They are two separate and distinct charges. Dr. Ruger testified that Cross met his death as the result of fourteen stab wounds. Therefore, in his opinion--and he is an expert--the death came about as the result of Cross being stabbed. Here the charge is, not that there was a stabbing insofar as the assault is concerned, but wilfull and dangerous bodily harm was inflicted upon the deceased. Grievous bodily harm is such harm which may be characterized by physical pain and suffering, hence suffering that is serious. It is not enough merely to injure, even if the grievous bodily harm results; rather, it is essential that intent to inflict the harm be present.

Gentlemen, the two charges, as I have already in-

dicated, are separate and distinct, requiring different degrees of proof, different kinds of proof. As to the manslaughter, do you find that these defendants were engaged in, involved in, carrying out their part; that they were acting in concert, that each one was doing something? Take the baseball game, the catcher and the pitcher; they each have objectives, but with all their concerted action, they produce one result. That is why you say they were acting in concert, or they were aiding and abetting each other. If you find that on that occasion these two defendants, and the others who are not on trial, all of them contributed to, by their act or by their statements, or did anything which you construe as having brought about or was intended to effectuate the carrying out what they were there to do; that is to say, stabbed the deceased, then I charge you as a matter of law you may find both the defendants guilty of the crime of manslaughter in the first degree.

If you have a reasonable doubt regarding the guilt of both or one of these defendants, regarding the crime of manslaughter in the first degree, you will then consider whether or not such individual regarding whom you entertain a doubt respecting the manslaughter charge, is guilty of assault in the second

degree.

Gentlemen, you then apply the law and consider the evidence. Do you find that anybody in this case, either one of these defendants, wilfully wounded or assaulted the deceased Jesse Cross? We are not concerned with the death in the assault charge, but do you find that the defendants wilfully wounded the deceased? Remember, there was testimony here about kicking and punching and shoving. I charge you now that is not the producing cause of death--kicking, punching and shoving. The cause of death will be predicated only on the stab wounds. If you find that either one of these defendants or both of these defendants did not do anything under the law, as I have given it to you, were not concerned in the killing, do you find that either one of them is guilty of having assaulted this Jesse Cross, of inflicting grievous bodily harm on Jesse Cross? That is for you to determine.

Gentlemen, you have two defendants on trial. The fact that they are both being tried jointly does not mean that you must not consider the case individually as against them. You have to go along on the theory that you have two separate, individual trials here. First decide the case as to one and then as

to the other. If you find that both defendants are guilty of manslaughter in the first degree beyond a reasonable doubt, say so, and find them guilty. If you have a reasonable doubt as to their guilt, acquit them. If you have a reasonable doubt regarding the guilt of one or both as to the charge of manslaughter, you will then proceed to determine whether or not you find them guilty beyond a reasonable doubt as to the charge of assault in the second degree.

I repeat, even though you have two defendants here, you must return two separate and distinct verdicts. I charge you again, you have two separate and distinct crimes.

Let me exhort upon you, gentlemen, we maintain our courts in order that trials may be fair. We maintain our courts so that every defendant charged with the commission of a crime may have his day in court. Don't let sympathy, passion or prejudice play any part in your deliberations here. Decide this case on the basis of the oath that you took. Remember the solemnity of the oath that was administered to you. Let your verdict, whatever it may be, reflect an honest, courageous consideration of the law in the case and the evidence, free from, stripped of any consideration other than those considerations contained in

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and outlined in the oath that you took.

Your verdict in this case, which must be unanimous, twelve one way or twelve the other, will be, not guilty as to both or guilty as to both on the manslaughter charge if you are satisfied as to the guilt of both beyond a reasonable doubt, or you may find one defendant guilty of manslaughter in the first degree and the other one not guilty, but guilty of assault in the second degree. If you find them guilty of manslaughter, you will find them not guilty of assault. If you find them not guilty of manslaughter, you may consider if you find them guilty of assault in the second degree.

Jurors Number 13 and 14, step aside for a moment.

Are there any requests or exceptions to the charge?

MR. STEINHAUS: Just one, your Honor.

THE COURT: Come up to the bench, gentlemen.

(At the bench.)

MR. STEINHAUS: I except to so much of the Court's charge as relates to the statement by La Frank that he saw Leroy kick the defendant.

THE COURT: My notes show that on cross-examination La Frank said he saw Leroy kick the deceased.

MR. STEINHAUS: I except to that portion of the

charge, your Honor. I think it would be wise to check with the minutes on it.

THE COURT: I will stand on my notes.

MR. PELCYGER: On behalf of the defendant Joel Smith, I have no exception, but I ask your Honor to charge the jury that the witnesses and the defendants whose cases were severed, Fred Sprinkler and Allen La Frank, are interested witnesses because of the interest they have in the outcome as to whether their pleas will be reduced as the result of their testimony in this case.

THE COURT: Did you hear me charge that their testimony must be scrutinized with great care?

MR. PELCYGER: I have an exception.

THE COURT: Gentlemen, I charged you generally on the attempt to ascertain whether any witness has an interest in the crime, to the effect that such interest may have motivated his testimony. As to Sprinkler and La Frank, the two men who pleaded guilty, you will consider whether you find them to be interested witnesses, but I have already charged you, and I repeat, you are to scrutinize their testimony with great caution.

MR. PELCYGER: I ask your Honor to charge the jury that if the jury find that the evidence is divided

equally as to innocence or guilt, then they must acquit the defendants.

THE COURT: Gentlemen, I have been requested and I do charge you that if you find the evidence is equally divided, one side indicating guilt and the other innocence, then the burden has not been met of proving the defendants guilty beyond a reasonable doubt. In that event, you must acquit the defendants, and if you find--I will go further--if you find that the evidence admits of two constructions, the one indicating guilt and the other innocence, you will similarly acquit the defendants because there again the defendants have not been proved guilty beyond a reasonable doubt.

THE COURT: (continuing) Gentlemen, you may go to lunch, and when you come back, go directly up to the jury room.

(The jury left the court room, but returned immediately and the following occurred:)

THE COURT: Gentlemen, my attention has been called to the fact that I was in error when I said that insofar as the witness La Frank is concerned, that he testified that he saw the defendant Leroy Sprinkler kick the deceased Jesse Cross. I was told that I was wrong. What he testified to was that he kicked Jesse

Cross--that he did La Frank kicked Jesse C[illegible] I didn't want that to go by unnoticed, because I want to be absolutely fair. That is why I had you brought back. You will forget what I said previously when I said that La Frank said he saw Leroy kick Cross. I was in error and I plead guilty to that.

You may now go to lunch.

(At 2:10 p.m. the jury left the court room, to begin their deliberations following their return from lunch.)

(At 7:10 p.m. the jury returned to the court room:

(Present: The Court, Mr. Levine, Mr. Pelcyger, Mr. Steinhaus, the defendant Sprinkler, the defendant Smith.)

(Roll called.)

THE CLERK: Gentlemen of the jury; have you agreed upon a verdict? If so, rise, Mr. Foreman.

How do you find as to the defendant Joel Smith?

THE FOREMAN: Guilty as charged of manslaughter in the first degree.

THE CLERK: How do you find as to the defendant Leroy Sprinkler?

THE FOREMAN: Guilty as charged--manslaughter in the first degree.

MR. PELCYGER: May I have the jury polled, your

APPENDIX B

DECISION OF DOOLING, D.J.

DATED APRIL 9, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

JOEL SMITH, also known as Charles Smith,

Petitioner,

-against-

SUPERINTENDENT, Attica Correctional Facility,

Respondent.

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MEMORANDUM and ORDER

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DOOLING, D. J.

Petitioner, then sixteen years old, was convicted on September 24, 1959, by a jury in the former County Court in the County of Kings of First Degree Manslaughter, and was sentenced on October 28, 1959, to be confined in a State Prison for not less than ten and not more than twenty years. Petitioner stood trial with Leroy Sprinkler, two other defendants having pleaded guilty, and Petitioner and his codefendant were found guilty. Leroy Sprinkler was sentenced with Petitioner to a term of not less than fifteen and not more than twenty-five years.

Petitioner's co-defendant, Leroy Sprinkler, appealed to the Appellate Division, Second Department, and, in November 1961, his judgment of conviction was reversed on

the law and the facts, and the indictment was dismissed as to him on the ground that Leroy Sprinkler had not inflicted any of the wounds and that there was no evidence that he either aided, abetted or acted in concert with anyone else in respect of the stabbing (which was the homicide involved) since the weight of the evidence, substantially uncontradicted, authorized findings that the defendant first interceded to stop a fist fight and then to prevent attacks with a knife (1961, App. Div.2d/N.Y.S. 2d 888, 221 149). The Court remarked

> "There is no evidence whatever of a pre-existing conspiracy between defendant and the assailants."

Petitioner failed to file a timely notice of appeal. His efforts to revive his appellate rights failed in the State Court (19 App.Div. 2d 728, 1963, and 14 N.Y. 2d 696, 1964, cert denied, 1965, 381, U.S. 920; three judges dissented from the denial of relief in the Court of Appeals). Thereafter the United States Court of Appeals accorded relief to Petitioner, United States ex rel Smith v. McMann, 2d Cir. 1969, 417 F.2d 648. Resentenced in Supreme Kings County to the same sentence, Petitioner then

appealed and the Appellate Division, Second Department affirmed without opinion, 1972, 337 N.Y. Supp. 2d 498; leave to appeal to the Court of Appeals was denied by Judge Burke on December 26, 1972..

Petitioner urges as grounds for federal relief the points made in the able and strongly argued brief which his counsel filed in the Second Department. Since only a few of the nine points made to the Appellate Division are even arguably available in the federal court only those which could possibly give rise to a federal claim will be discussed. First, however, the evidentiary case against the Petitioner made out at the trial must be outlined.

The evidence of petitioner's participation in the killing of Jesse Cross was unusual. Cross died after fourteen knife wounds were inflicted on him somewhere around 9:30 to 10:00 o'clock on the night of Saturday, April 8, 1959, in a playground in the Bedford-Stuyvesant neighborhood in Brooklyn by young companions with whom he had been drinking. The evidence gave a solid basis for concluding that on the Saturday night in question all the young men, or boys, for the defendant and certain of the others were

no more than that, were drunk. There was confusing evidence that they had with them from two to seven bottles of wine. Those in the playground when Cross was killed were two brothers, Fred and Leroy Sprinkler, Allen LaFrank, Arthur Burrows, Daniel Paccilli and the Petitioner, Joel Smith. There was only one knife among those present at the park, according to the evidence, and it was a knife owned by Allen LaFrank which he had earlier in the evening given to Petitioner Joel Smith and which Joel Smith took with him when he and Allen LaFrank went together to the playground and joined the others.

The witnesses were in general agreement that at some point Fred Sprinkler and Jesse Cross quarreled. Fred Sprinkler told Jesse Cross to go home and get a coat, or to put a coat on, Cross objected, words sharpened between Fred Sprinkler and Jesse Cross and suddenly Cross struck out at Fred Sprinkler, or Sprinkler struck Cross first, Joel Smith moved, knife in hand, toward the fracas, Leroy Sprinkler pushed his brother Fred away from Cross and slapped Cross, pushing or knocking him down towards a bench, Smith's advance was stopped by one or other of the

Sprinklers, the knife was taken from or given up by Smith and got into the hands of Allen LaFrank*. LaFrank then passed the knife to Fred Sprinkler, and Fred Sprinkler stabbed Jesse Cross in the abdomen four times as Cross supported himself against or sat on the bench. At the end Cross lay on his back on the bench face up and bleeding from the stab wounds.

There is no direct testimony that Joel Smith stabbed Cross. However Fred Sprinkler and one Tommy Abrams testified that after the stabbing of Cross by Fred Sprinkler, Joel Smith met Fred Sprinkler and Tommy Abrams some distance from the playground and told them that Jesse Cross had survived the wounds that Fred Sprinkler had inflicted and that Joel Smith had himself stabbed him twice more. Abrams testimony was in substance that Joel Smith told him at this later meeting (Tr. 32) that "they" (or "we") just "messed up a guy " (Tr. 36), and "after they left" (Tr.34-35) - "after youse left, him [Joel Smith] and somebody else - I am sure he said that - him and somebody else went back and stabbed him [Cross] again." (Tr.34, 36.) Fred Sprinkler testified that (Tr. 82)

> "He said to me that I [Sprinkler] stabbed him four times, and that he [Cross] was still alive when I [Sprinkler] left, and he [Smith] stabbed him twice himself."

In addition, the somewhat redacted confession of Leroy Sprinkler, who alone stood trial with Joel Smith, was read against Leroy Sprinkler, but not against Joel Smith. While the redacted confession did not recite the words that Joel Smith is said to have used when he allegedly met Tommy Abrams and Fred Sprinkler later in the evening, the part of the confession that was read asserted that Joel Smith had met Tommy Abrams and Leroy Sprinkler and his brother after the killing, to that extent materially corroborating Abrams and Fred Sprinkler (Tr. 163-164). Enough of the confession was read plainly to indicate that it had originally contained some assertion about what Joel Smith had said (Tr. 163, ll.22-23). In addition Detective Elias Reiter testified that Joel Smith took him to an electric catch basin in the neighborhood and pointed out where the knife used in the killing had been concealed by him (Tr. 176-177). The knife was retrieved and offered in evidence at the trial. Detective Michael Luisi was

permitted to testify that he had interviewed Leroy Sprinkler twice, and that at the first interview, on the morning of April 9th, Leroy Sprinkler had denied any complicity in any crime. Detective Luisi testified that in a later interview on the same day in the afternoon Leroy Sprinkler implicated his brother Fred in the fracas, asserted that Joel Smith had run up with a knife in his hand, attempting to go toward Cross and stick him with the knife, (Tr.181-182) and said also that he (Leroy) his brother Fred and Tom Abrams were together at Ralph Avenue and Pacific Street in the Bedford-Stuyvesant neighborhood later that evening (Tr. 181). Finally, Detective Richard Burnes was permitted to testify that he, too, had interviewed Leroy Sprinkler twice, and that at the second interview (Tr.195-197) Leroy Sprinkler implicated himself and his brother, and related the later meeting on Ralph Avenue and Pacific Street with Joel Smith in Abram's presence. Detective Burnes testified over Petitioner's objection (Tr. 196)

> "I asked him [Leroy], 'Did Joel Smith have anything to say about the stabbing?' He said, 'Yes, Joel came along and told Abrams, while I was standing there, that my brother did a guy over, but he was not dead and I [Joel Smith] did him over a couple of more times and he is dead now."

Concerning Petitioner's direct participation in the events surrounding Fred Sprinkler's stabbing of Cross, the direct evidence was given by Paccilli and Burrows, who were not indicted and, arguably, were not "accomplices," and by Allen LaFrank and Fred Sprinkler who had been indicted (and who had pleaded guilty to First Degree Manslaughter on the understanding that, if they testified truthfully at the trial, they would be sentenced for Second Degree Manslaughter, unarmed). The testimony of the four differed in details, but, broadly, all testified that Joel Smith had produced the weapon, had advanced toward the fray, had been deprived of the weapon or had voluntarily given it to Allen LaFrank who gave it to Fred Sprinkler, and that Fred Sprinkler had at once stabbed Cross four times . Paccilli testified that Joel Smith had said as he advanced with the knife,

"I am going to stab him." [Tr. 56]

Fred Sprinkler testified that Joel Smith had pulled out the knife to stab Jesse Cross but that he, Fred Sprinkler, stopped him from doing that, and that, as Leroy Sprinkler stepped between the combatants, Allen LaFrank came over,

took the knife from Joel Smith and gave it to Fred Sprinkler (Tr. 81). Allen LaFrank testified that while Leroy Sprinkler was intervening and pushing and slapping the combatants, Joel Smith took out the knife, and then LaFrank took the knife from Joel Smith and gave it to Fred Sprinkler (Tr. 124). Burrows testified (Tr. 166-167):

> "Then after a while, Joel Smith pulled out a knife and said 'Stick the boy,' and he ran toward Jesse [Cross], and Leroy grabbed him and took the knife from him and pushed him back."

After that, Burrows said, petitioner went or was pushed to a bench to sit and cool off, and he vomited; Burrows saw that Fred Sprinkler had stabbed Cross (Tr. 167).

The medical testimony was that, of the fourteen stab wounds inflicted on Cross, nine, in the opinion of the Assistant Medical Examiner, were such that each one alone could have produced death either through hemorrhage or through infection, and that the knife in evidence was such a weapon as could have produced each of the stab wounds inflicted on Cross (Tr. 72-73, 75).

The evidence more than sufficed to support a verdict of Petitioner's guilt beyond a reasonable doubt of the

precise charge - save for the allegation of an act done "in the heat of passion" - that is, that Smith and others, acting in concert and each aiding and abetting the other, without a design to effect death, in the heat of passion, struck Jesse J. Cross with a dangerous weapon, to wit: a dangerous knife, and with their hands, fists and booted feet, thereby inflicted divers wounds upon Jesse J. Cross and Cross died of the wounds, said act not being justifiable or excusable.

In various forms Petitioner has argued that his conviction at best rested upon uncorroborated accomplice testimony, and that his critical admission, in particular, was not adequately corroborated. The jury, however, was free to find that Abrams's testimony corroborated Fred Sprinkler's testimony that Petitioner admitted that he had stabbed Cross twice, and the jury could well find that Paccilli and Burrows corroborated the testimony of LaFrank and Fred Sprinkler that petitioner had an aggressive role in/first the phase of/killing. The evidence was that Petitioner had and produced the weapon, introduced it into the fray, and, according to Paccilli and Burrows, who quite probably

were not accomplices, that Petitioner had advanced toward the fray with the knife saying something like "I am going to stab him" or "stick the boy." The evidence is also clear that petitioner was frustrated in his intervention, if intervention it was, but the jury could find beyond a reasonable doubt that the impetus that made the attack on Cross a fatal one came from the petitioner, that he stimulated the homicidal turn that the affray took.

The jury could have attached importance to the testimony that the Petitioner knew where the knife was secreted after the killing and led Detective Reiter to its hiding place. It is argued that Petitioner was manifestly in custody at that point, whether or not he was under arrest, and he was certainly in the focus of accusation. It is inferred that Detective Reiter did not "give Petitioner his rights" (Tr.157, 178). However, Escobedo v. Illinois, 1964, 378 U.S. 478, was five years in the future, and Miranda was farther off still. Hence the only question was whether coercion produced the inculpatory episode, or it was voluntary, and only in that perspective did the absence of advice of rights have a place, under now familiar law.

No point whatever was made at the trial, and, so far as appears, at no time has the question of involuntary or coerced conduct on petitioner's part been presented to the State Court. The matter, cannot therefore be considered at this time in this Court.

Petitioner charges in a variety of ways that the charge of the Court to the jury was unfair. The transcript demonstrates that the charge was meager and inadequate (Tr. 288-315). Two counts were submitted to the jury, the First Degree Manslaughter count, and a second charge of second degree assault, that the defendants acting in concert and each aiding and abetting the other, assaulted Jesse Cross by wilfully and wrongfully wounding and inflicting grievous bodily harm upon him with hands, fists, booted feet and knife. There was evidence that the petitioner inflicted two stab wounds. The jury was not instructed as to what, if any, verdict and which, if either, count they could find against petitioner if not satisfied that he was an active participant in the first affray but were satisfied that he inflicted two later wounds and were not convinced that the wounds he inflicted were among the fatal

wounds. From Fred Sprinkler's testimony the jury might have concluded that Fred Sprinkler's wounds in the abdomen had killed Cross and that the undescribed wounds inflicted by petitioner, if he inflicted any (for that depended on acceptance of the testimony respecting his alleged admissions) were not mortal and did not accelerate death.

The testimony was replete with evidence that the young men had been drinking heavily and over a long period of time. Section 1220 of the former Penal Law provides that no act committed during voluntary intoxication is deemed less criminal for that reason, but it also provides that whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated in determining the purpose, motive or intent with which he committed the act. The Manslaughter charged, under Penal Law Section 1050, was homicide committed "without a design to effect death ...in the heat of passion, ... by means of a dangerous weapon." Manslaughter in the Second Degree was homicide committed without a design to effect death

"By any act [or] procurement ... of any person, which, according to the provisions of this article does not constitute the crime of ... manslaughter in the first degree." While the charge to the jury contains much discussion of intent, nothing was said about intoxication or its possible effect on intention (Tr. 299, 304, 306, 307-308, 309). The Court excluded Second Degree Manslaughter from the consideration of the jury, although former Code of Criminal Procedure Section 444 would have authorized submission of it, and Section 445 would have authorized a finding of guilt of the lesser degree of manslaughter. Rather, the Court gave the case to the jury finally in the following form (Tr. 312):

> "Your verdict in this case, which must be unanimous, twelve one way or twelve the other, will be, not guilty as to both or guilty as to both on the manslaughter charge if you are satisfied as to the guilt of both beyond a reasonable doubt, or you may find one defendant guilty of manslaughter in the first degree and the other one not guilty, but guilty of assault in the second degree. If you find them guilty of manslaughter, you will find them not guilty of assault. If you find them not guilty of manslaughter, you may consider if you find them guilty of assault in the second degree."

In the light of People v. Koerber, 1926, 244 N.Y. 147, and People v. Lynch, 1968, 23 N.Y. 2d 262, it would have appeared necessary to discuss with the jury the meaning of the expression "in the heat of passion" as used in the manslaughter statute in the light of the nature of the episode which the jury was considering. The old manslaughter first degree statute was an extraordinarily difficult one for the Courts to work with because the uncertain meaning of the words "without a design to effect death" coupled with the use in the same statute of the requirement of the coincidence of the "heat of passion" with inflicting death either in a cruel and unusual manner or else by means of a dangerous weapon made jury instruction peculiarly difficult. In the present case it gave rise to what might well appear to be a most damaging instruction (Tr. 299):

> "The prosecution need not prove that there was no design to effect death. If you come to the conclusion, gentlemen, that the prosecution has established the guilt of the defendants, and the essential elements of the crime of manslaughter in the first degree beyond a reasonable doubt; that is, that the death was caused by the use of a dangerous weapon, and by a dangerous weapon in this case is meant a knife, then it will be your duty to convict them of the crime of manslaughter in the first degree."

The presence in the same indictment of the assault count resulted in the Court's also telling the jury at another point (Tr.307) that the defendants were charged with wilfully and wrongfully assaulting Cross by use of a dangerous weapon likely to produce grievous bodily harm and that in that connection the prosecution had to prove "beyond a reasonable doubt ... that the defendants assaulted Jesse Cross with the specific intent to do him bodily harm, and that they used for that purpose the knife in question." The Court explained that intent would have to be determined by acts and declarations. Said the Court (Tr. 308):

> "So that the remedy of ascertaining one's intent is not limited merely to the exercise of your vocal cords. You may give out with expressions of what your intent is by the way you are conducting yourself. In other words, actions speak louder than words, and the law says that every person is presumed to intend a natural consequence of his act."

And later on the same page

> "It is not enough merely to injure, even if the grievous bodily harm results; rather, it is essential that intent to inflict the harm be present."

What is lost in the approach of the charge is that it gave the jury no opportunity to decide that the killing was a grisly misadventure resulting from a senseless

irruption of words in the middle of a drinking bout rather than a killing "in the heat of passion." The charge was pushed off center further by the necessity for charging the ideas of aiding, abetting and concerting; that gave to the whole of the charge a sort of background of calculated co-action alien to the nature of the drunken occasion and to the kind of fleeting and transient co-action that involved the brawling young men in responsibility for the death of Cross.

Petitioner renews his argument to the Appellate Division that the charge failed in dealing with his failure to testify. Neither defendant on trial testified. The only defendants who testified were those who had pleaded guilty and were testifying under a promise of consideration if they testified truthfully. The former Code of Criminal Procedure provided in Section 393

> "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

The rigidly enforced practice in New York was to require the Courts to charge on the point, if they charged at all, in precisely the language of the statute. People v.

McLucas, 1965, 15 N.Y.2d 167, 171.

The Court charged (Tr. 305)

> "The defendants did not testify in this case. I charge you now that a person or persons accused of crime may or may not refuse to testify in their own behalf, and their failure to do so raises no presumption against them; in other words, the mere fact that the defendants did not testify, raises no unfavorable impression against them.
>
> "The defendants have not taken the stand and you will consider then the case on the basis of the testimony you have heard."

The language chosen was certainly unhappy under People v. Manning, 1938, 278 N.Y. 40, and the leading case, People v. Fitzgerald, 1898, 156 N.Y. 253, 266, in which the Court said

> "The fact that the accused does not testify in his own behalf cannot be permitted to create any presumption against him. That is the plain mandate of the law, and the force of the proposition should not be weakened and destroyed with the jury by qualifying words."

In the light of Griffin v. California, 1965, 380 U.S. 609, and the strength of the New York insistence on not going beyond the sufficiently unfortunate language of former Section 393, the language chosen by the Court in

the present case was doubly dangerous. To start with drawing attention to the absence of the defendant's testimony, then to approximate the idea of the statute in unhelpful and repetitious variation from its language, and to follow up with repeating that the defendants had not taken the stand and that the case would have therefore to be considered on the basis of the testimony of the witnesses that the jurors had heard went far to deny to petitioner the protection of the Fifth Amendment and of Section 393. It was close to what Mr. Justice Douglas characterized as the Court's solemnizing the silence of the accused into evidence against him (Griffin v. California, supra at 614). It is at least interesting to note the implied opinion of the legislature as expressed in the new Criminal Procedure Law § 60.15(2). The language of the present statute is

> "A defendant may testify in his own behalf, but his failure to do so is not a factor from which any inference unfavorable to him may be drawn."

The neglect, refusal and presumption language is jettisoned. In addition the new code of the new Criminal Procedure Law, Section 300.10(2), in describing what the charge of the Court must include, provides that

> "Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn."

The attorney for petitioner did not take any relevant exception to the charge of the Court as given, and petitioner must rely on the former Code of Criminal Procedure, § 542 and the nature of the errors, if such they be, and inadequacies in the charge of the Court.

(1) However, these questions were never directly presented to the Appellate Division as a challenge to the instructions of the Court as a whole, and with particular reference to the cumulative, or rather synergic, effect of the inadequacies, omissions and errors in the charge as amounting in the aggregate to the denial to the petitioner of a fair submission of the actual case that had been tried to the jury in clear language that would enable the jury genuinely to evaluate the evidence against the petitioner and to reach a fair, informed verdict.

(2) A second set of considerations arises out of the use against the petitioner of the out-of-court declaration of his co-defendant Leroy Sprinkler which so deeply

implicated the defendant. As the case finally reached the Appellate Division and reaches the present court, it is known that Leroy Sprinkler was entitled to a judgment of acquittal upon his own motion when the People rested their case in chief against both defendants. At that point, had the motion been granted when made (Tr. 211), Leroy Sprinkler would have been available to the Petitioner as a witness, ifindeed an involuntary witness, since, apparently, he would have had no Fifth Amendment privilege in the light of his acquittal on the inclusive charges in the indictment.

Bruton v. United States, 1968, 391 U.S. 128, is retroactive in its operation. Roberts v. Russell, 1968, 392 U.S. 293. Harrington v. California, 1969, 395 U.S. 250, holds that where there has been a transgression of the Bruton principle, reversal is not inevitable if, under the rule in Chapman v. California, 1967, 386 U.S. 18, the trial record presented such overwhelming evidence of the defendant's guilt that the violation of Bruton was beyond a reasonable doubt harmless. See, e.g., Schneble v. Florida, 1972, 405 U.S. 427.

So far as appears, the Bruton point has not been

presented to the State Court. It cannot be said that it is self-evident from the record that the apparent transgression of the Bruton principle would constitute harmless error within the Chapman-Harrington principle, and the application of that principle should in the first instance take place in the State Court.

While, therefore, two matters remain for full consideration in the State Court, that is, first, review of the charge in the respects noted above with a view to determining whether it resulted in denying petitioner fundamental due process through failure to effect a fair submission of the case to the jury as against petitioner, and second, the Bruton-Chapman-Harrington matter, in view of the lapse of time since the conviction and since the re-sentence, the case will be retained pending further review in the State Court which the petitioner should promptly seek.

It is accordingly,

ORDERED that the petition for a writ of habeas corpus is held to be sufficient and is retained on the docket of this Court for a further period of two months

from today's date; within that period petitioner should apply in the State Court for a further review of the judgment against him in the light of the considerations hereinabove set forth; the attention of the District Attorney and the Attorney General is earnestly solicited to facilitating the submission of the matter to the State Court for final adjudication.

Brooklyn, New York

April 9, 1974.

U. S. D. J.

June 9, 1974

*Either directly from Joel Smith or from Leroy Sprinkler, who took it from Joel Smith as Smith advanced toward Jesse Cross.

A.D.A. Holman Brock
643-5426
Eugene Share
who handled case

APPENDIX C

DECISION OF DOOLING, D.J.

DATED AUGUST 15, 1974

Received August 16, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

JOEL SMITH, also known as Charles Smith,

Petitioner,

-against-

SUPERINTENDENT, Attica Correctional Facility,

Respondent.

73 C 238

MEMORANDUM and ORDER

- - - - - - - - - - - - - - - - - - - -X

It appears that after the entry of the decision of April 9, 1974, Petitioner was permitted to move pro se to reargue the earlier appeal (decided November 13, 1972, without opinion, 337 N.Y.Supp. 498), and the motion was denied on July 2, 1974, the Court saying

> "With due respect to any view which the United States District Court may have, this court has considered all the issues on this motion and the predicate appeal. We adhere to our position after reconsideration and trust that the Federal court will likewise respect the autonomous jurisdiction of this court over the subject matter of the appeal."

Since the record does not disclose that the Court has considered the constitutional questions presented and adjudicated them in accordance with the applicable principles

of constitutional law, the federal court is not free to deny relief.

For the reasons set forth in the Memorandum and Order of April 9, 1974, it is concluded that Petitioner was denied fundamental due process in the manner in which the case was submitted to the jury, and in the use in evidence of the Leroy Sprinkler confession.

It is regrettable, certainly, that the State-Federal system is such that the responsibility of acting in cases of this kind falls in the first instance on one-judge federal tribunals, but the able Attorney General can surely, by prompt appeal to the United States Court of Appeals for the Second Circuit, effect a reversal of the District Court decision if it is erroneous.

The Petitioner is at this time at the Bedford Hills Correctional Facility, Bedford Hills, New York, 10507, and is no longer at the Attica Correctional Facility.

It is accordingly

ORDERED that a writ of habeas corpus issue, as prayed by Petitioner, to the Superintendent of the Bedford Hills Correctional Facility requiring the Superintendent to

bring Petitioner before this Court forthwith there to be released from custody, on his own recognizance, without surety, on the ground that his further detention under the sentence imposed in the Supreme Court of the State of New York, County of Kings on January 13, 1972, is illegal.

ENFORCEMENT of this order is stayed, pursuant to Rules 8(a) and 23(c) of the Federal Rules of Appellate Procedure, until August 30, 1974, at 2:00 P.M. in order to enable the Attorney General to apply to the Court of Appeals for a stay of enforcement pending appeal if an appeal is planned.

Brooklyn, New York

August 15, 1974.

U.S.D.J.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

RALPH L McMURRY , being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellant herein. On the 17th day of September , 1974 , he served the annexed upon the following named person :

William Epstein, Esq
Legal Aid Society
US Courthouse
Foley Square
NY NY
10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ralph L McMurry

Sworn to before me this
17th day of September , 1974

Hellel Hoffman
Assistant Attorney General
of the State of New York